

**U.S. Department of Labor**

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**Issue Date: 29 June 2004**

Case Nos.: 2003-LHC-01314  
2003-LHC-01315

OWCP Nos.: 03-27947  
04-35953

In the Matter of

JOHN COLEY  
Claimant

v.

HOLT CARGO SYSTEMS, INC.  
Employer

U.S. FIRE INSURANCE CO.  
Carrier

and

GREENWICH TERMINALS, LLC  
Employer

AMERICAN MOTORISTS INC., CO.  
Carrier

Appearances:

David Linker, Esquire  
For Claimant

John Kawczynski, Esquire  
For Employer Holt Cargo/Carrier U.S. Fire Insurance. Co.

Eugene Mattioni, Esquire  
For Employer Greenwich Terminals/Carrier American Motorists Inc.

Before: Janice K. Bullard  
Administrative Law Judge

## DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("the Act"), and the regulations promulgated thereunder. A hearing was held before me in Cherry Hill, New Jersey on September 16, 2003. At the hearing, Claimant submitted deposition testimony of Dr. Lefkoe, which was marked as CX-1 and admitted to the record.<sup>1</sup> Employer Holt's Exhibits marked PEX 1 through PEX 23 were admitted, and Employer Greenwich's Exhibits marked EX 1 through EX 10 were admitted.

Claimant filed his brief and closing argument on December 22, 2003. On December 24, 2003, the closing argument of Employer Greenwich Terminals and Carrier American Motorists Inc. ("Greenwich") was filed. On January 5, 2004, the brief of Employer Holt Cargo Systems, Inc. and Carrier U.S. Fire Insurance Co. ("Holt") was filed. On January 13, 2004, Holt filed a reply brief. The following decision is based upon an analysis of the record, the arguments of the parties and the applicable law.

## BACKGROUND<sup>2</sup>

John Coley ("Claimant" hereinafter) is a member of ILA Local 1242, and has worked as a cargo checker for various companies in the port of Philadelphia since leaving high school in the eleventh grade. During the course of his employment he had sustained injuries to his lumbar spine and his right upper extremity. While employed by Holt, on February 24, 2001, Claimant turned the steering wheel of his pickup truck and experienced pain in his spine and neck, for which he sought treatment. On April 4, 2001, he experienced an increase in his symptoms in his neck and right upper extremity, which he reported in an accident report. He stayed off work upon the advice of his doctor, and returned on a part-time basis in August, 2001. He was gradually restored to full time duty, which he accomplished on October 26, 2001. Claimant brought a claim against Holt under the Act. A hearing on that claim was held before Administrative Law Judge Ralph Romano, who in a Decision and Order issued April 25, 2002, found that the incident of April 4, 2001 had aggravated Claimant's pre-existing cervical and thoracic conditions. ALJ Romano awarded Claimant temporary total disability from April 5, 2001 through October 26, 2001.

Claimant commenced his employment as a cargo checker for Greenwich in May, 2002, performing the same duties with the same equipment as he had performed during his years with Holt. TR at 33. Mr. Coley used a 1991 Chevy S-10 pickup truck to drive around the Packer Avenue Marine Terminal to locate containers and chasses. TR 34-37. On September 11, 2002, Mr. Coley testified that he experienced sharp pains in the left side of his chest and felt soreness in his upper back and neck. TR at 45. Mr. Coley reported his symptoms to his supervisors and was transported to Methodist Hospital, where he was hospitalized for two days of tests. TR 45,

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<sup>1</sup>In this decision, "CX" refers to Claimant's exhibits; "EX" refers to Employer Greenwich's exhibits; "PEX" refers to predecessor Employer Holt's exhibits; "TR" refers to the transcript of the September 16, 2003 hearing, and "NT" refers to notes of deposition transcripts.

<sup>2</sup> The factual background has been excerpted from the Decision and Order of April 25, 2002 of Administrative Law Judge Ralph Romano, as well as the evidence before me.

50, 61-65, 71. Upon his release, he sought treatment for neck and back pain, and filed the instant claim for compensation under the Act. As of the date of the hearing, Claimant had not yet returned to his full-time employment.

## I. ISSUES

The issues presented for adjudication are:

1. Whether Claimant sustained a compensable injury under the Act while employed by Greenwich on September 11, 2002;
2. The nature and extent of the disability, if any, resulting from any injury sustained on September 11, 2002;
3. Whether Claimant complied with medical treatment;
4. Whether Claimant's injury, if any, was the aggravation of or natural progression of Claimant's prior injuries, which were established by the April 25, 2002 Decision and Order issued by ALJ Ralph A. Romano;
5. If an injury is established and found to be the natural progression of Claimant's prior injuries, whether section 8(f) relief is appropriate;

## II. CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to total disability benefits from Greenwich because he suffered a compensable injury when his pre-existing injury was aggravated on September 11, 2002. In the alternative, Claimant argues that Holt should be found liable for his current disability, should it be found that it arose as a natural progression of his pre-existing injury.

Holt contends that Claimant did not sustain a compensable injury on September 11, 2002, while employed by Greenwich. In the alternative, Employer Holt argues that any injury that Claimant may have sustained on September 11, 2002 was an aggravation of his pre-existing injury, established by Decision and Order of April 25, 2002 of ALJ Romano. Holt argues that the "aggravation rule" applies, rendering the subsequent Employer Greenwich fully liable for the Claimant's disability.

Greenwich maintains that Claimant did not sustain a compensable injury on September 11, 2002. In the alternative, Employer Greenwich contends that Claimant's current condition results from the natural progression of an initial injury that would have occurred notwithstanding a subsequent injury, thereby rendering Holt the liable party.

## III. STIPULATIONS OF THE PARTIES

The parties entered into the following stipulations: (TR at 7; Pre-hearing statements and filings of the parties.)

1. Claimant alleged that he was injured on September 11, 2002, while in the employment of Greenwich.

2. An employer-employee relationship existed at the time of the alleged injury.
3. Greenwich was timely notified of the alleged injury to Claimant's spine.
4. Greenwich paid Claimant temporary total disability benefits for the period from September 12, 2002 until September 30, 2002 in the amount of \$2,182.45.
5. Greenwich paid Claimant's medical expenses of \$5,107.88.
6. Greenwich timely filed a Notice of Controversion on February 5, 2003.
7. Claimant's average weekly wage is \$1,206.07 and he has a compensation rate of \$805.05.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### a. Summary of the Evidence

##### **Testimony (non-medical)**

##### John Coley

At the hearing, the sixty-one year old Claimant testified that he has worked as a cargo checker at the Port of Philadelphia for approximately 35 years. TR at 30-31. Claimant uses a pickup truck to travel to various areas of the Marine terminal to check cargo. TR at 33-35. Mr. Coley described his general health in September, 2002 as including occasional back and neck pain and said that he felt "discomfort in [his] upper back and lower back, [his] neck" during the week or so before September 11, 2002. TR at 38. He said that he took Advil, Tylenol and used a heating pad to help the pain. TR at 44. At that time, he was not under a doctor's care, and he said that his only prescription medication was for allergies and cholesterol, prescribed by his family doctor, Dr. Polan. TR at 38. Mr. Coley testified that his soreness was the residual pain from a previous injury. TR 41. While employed with Holt, Claimant experienced pain in his upper and lower back, and was unable to work during treatment for a spinal disorder. He treated with Dr. Freedman from April 4, 2001 until his discharge from treatment in October or November, 2001. TR at 42. Claimant returned to work on a part-time basis on August 21, 2001, and by the time he was discharged from treatment in October or November, 2001, he was working a five day week. TR at 73-74. Claimant stated that his only medical restriction was not to work overtime. After July 4, 2002, Claimant worked 3 days a week, taking Mondays and Fridays as vacation days. Id. After Labor Day (September 4, 2002), Claimant returned to a full time schedule, working five days a week. Id. The incident on September 11, 2002 occurred within the first week that he was back on a full-time schedule.

Claimant testified that in the morning of September 11, 2002, he was "a little sore off and on". TR at 45. He said that in the early afternoon, he felt "sharp pains in [his] left side, in [his] chest after traveling over some railroad tracks. TR at 45-46; EX-3 at 45. When the pain did not subside, he asked his supervisor to call an ambulance for him. TR at 46. Mr. Coley was taken to

Methodist Hospital, which admitted him for testing for a cardiac condition. TR at 50. He was discharged after two days, with no cardiac diagnosis. Id. Claimant sought treatment with Dr. Milton Freedman, D.O, who had previously treated him, but the doctor was not available. TR at 52. Claimant's counsel referred him to Dr. Lefkoe, who saw him for the first time on September 19, 2002. He underwent physical therapy for eight months, which he terminated with his doctor's consent because it hurt his back. TR at 53. Claimant testified that although surgery has been recommended, he is fearful that surgery will make his condition worse. TR at 56.

Claimant stated that he always drove the same pickup truck, which is equipped with automatic transmission and power brakes and steering. TR at 56. Claimant said that the trucks were not new, and he considered them "junk". TR 56-58. Claimant testified that the seat of his vehicle was replaced a week or two after he returned to work following his 2001 injury, but said that it shifted when he applied the brakes. TR at 48, 56-58. He described the roads of the terminal as being in poor condition and marred by potholes, and further said that they are crossed at several areas by railroad tracks. TR at 37; 48. Claimant took pictures of the terminal in May, 2003 that he asserted showed potholes. TR at 49-50; EX-3(a)-(d). Mr. Coley testified that the potholes were repaired on occasion, but the repairs were not permanent. Id. He disagreed that the videotape in evidence accurately depicted the state of the terminal when he worked there. TR at 49. Mr. Coley testified that he complied with the speed limit of 15 miles per hour while driving around the terminal, and slowed down when he approached railroad tracks. TR 64-63. During the summer of 2002, he drove his own vehicle for personal use, and testified that he put approximately 20,000 miles on his current car in the three years that he has owned it. TR at 75. He accumulated a lot of the mileage driving between his homes in the city and at the seashore. TR at 76.

Claimant testified that although he continued to experience intermittent pain since his return to work in the fall of 2001, he took over-the-counter pain medications and used a heating pad for his symptoms. TR at 44. He continues to feel discomfort in his neck and lower back. TR at 55. He gets light headed and dizzy, and feels weakness in his leg. Id. He said that he would not be able to perform his job duties, and testified that he has been approved for Social Security disability. TR at 55.

Claimant also testified at a deposition held on April 30, 2003. EX-3.

Robert H. Kermon, Jr. (EX-10)

Mr. Kermon was the Director of Safety and Loss Control for Greenwich Terminals on September 11, 2002. NT at 6-10; 18-20. His duties included administering the company's safety programs and investigating accidents. NT 8-9. Mr. Kermon recalled that at about 12:35 p.m. on September 11, 2002, Greenwich supervisor John Burleson called and advised him that Mr. Coley was not well. NT 20-21. Mr. Kermon went to where Claimant had stopped driving and after administering first aid to him, arranged for an ambulance to transport Mr. Coley to the hospital. NT at 26. Mr. Kermon stated that Claimant told him that he felt pain in his upper and lower back while crossing over railroad tracks in his truck. TR at 27.

Mr. Kermon testified that he investigated Claimant's complaints about the condition of the roadway in the terminal and did not observe any hazardous conditions, other than some minimal deflections in the roadway. NT 30-33. He described a deflection "as a small indentation or something of that nature". EX-10 at 33. Mr. Kermon also inspected Claimant's vehicle and concluded that it was in good condition. NT 39-40. Mr. Kermon took photographs of Claimant's truck and the roadway between the railroad tracks on September 11, 2002. NT 28-40.

## **Medical Evidence**

### Roy T. Lefkoe, M.D. (CX-1)

Dr. Lefkoe is a board certified orthopedic surgeon who examined Claimant initially on September 19, 2002. Dr. Lefkoe documented Claimant's symptoms, and upon examination, observed tenderness and restricted range of motion in Claimant's neck and upper and lower back. The doctor concluded that Claimant suffered from cervical, thoracic and lumbocacral sprain and strain aggravating pre-existing degenerative disc disease and spondylosis and multiple chronic disc herniations. Dr. Lefkoe prescribed Vioxx and physical therapy.

Dr. Lefkoe examined Claimant on October 7, 2002, and noted that while he continued to experience pain, therapy and medication were helping his symptoms. Dr. Lefkoe observed that Claimant's grip, biceps and triceps strength were less than he noted at his initial examination. The doctor recommended that the Claimant undergo MRIs of his cervical and thoracic spine, and remain off work. When Dr. Lefkoe next saw Claimant on October 28, 2002, he noted a positive Babinski sign that suggested compression of the cervical spine at C3-C4 due to a central disc herniation. The doctor prescribed a cervical collar and consultation with a neurosurgeon. Claimant's medication was also changed to Naprosyn and Darvocet because of his complaints of dizziness with Vioxx. Dr. Lefkoe found Claimant's condition unchanged at his next evaluation on November 25, 2002.

The Claimant saw Dr. Lefkoe again on January 2, 2003, and then on January 29, 2003. He reported experiencing left leg weakness and continued cervical and upper back pain. His examinations revealed positive Babinski signs and restricted motion and tenderness in the cervical area. The doctor did not note any specific motor, sensory or reflex deficit. The doctor recommended that Mr. Coley continue his course of medication and physical therapy, and recommended that he consider surgery, as suggested by neurosurgeons Drs. Cohen and Barolat.

Dr. Lefkoe's examinations of Claimant in March found his condition unchanged. At his examination on April 28, 2003, Dr. Lefkoe observed that Claimant had a positive sitting root test at 70 degrees. Dr. Lefkoe noted that Claimant's cervical MRI of April 22, 2003 demonstrated a large C3-C4 disc herniation compressing the spinal cord along with a mild central disc herniation at C6-C7. Dr. Lefkoe recommended that Claimant continue his treatment and ordered an MRI of Claimant's lumbar spine in consideration of the sitting root test findings.

Dr. Lefkoe saw Claimant again on May 27, 2003, and noted his complaints of continued pain in his neck, upper and lower back and radicular symptoms in his legs. Examination

demonstrated lumbar tenderness and restricted range of motion. The doctor observed that Claimant's lumbar MRI performed on May 13, 2003 showed disc herniations at L4-L5 and L5-S1 producing lateral recessed stenosis. Dr. Lefkoe recommended that Claimant terminate physical therapy, and start home exercises. He prescribed a Licoderm patch and continued Claimant's medications. Dr. Lefkoe diagnosed Claimant with acute cervical, thoracic and lumbar sprain and strain. The doctor attributed Claimant's condition to Claimant's sudden onset of pain from the incident at his work on September 11, 2002. The doctor stated that "[t]he incident also aggravated all of his pre-existing disc herniations and produced a cervical myelopathy which was not there before." CX 1 at 36.

The doctor was skeptical that Claimant's condition could be the result of his degenerative disease without some trauma and said: "I don't think just the disease of his spine without an aggravated condition would have caused him to have a sudden severe pain, severe enough that he thought he was having a heart attack and was rushed to the emergency room." CX-1 at 43-44. However, Dr. Lefkoe also admitted that Claimant's pre-existing disease of the cervical thoracic lumbar spine is a significant aspect of his disability, and that a sudden onset of pain would be related to the underlying pathology in his neck, even in the absence of any trauma. CX-1 at 61-63. Dr. Lefkoe admitted that he strongly suggested that Mr. Coley undergo cervical surgery. CX-1 at 60. The doctor stated that without surgery, Claimant faced the risk "that his condition could worsen either gradually or suddenly with minimal additional trauma. And that he could have loss of bowel and bladder function. That he could have total paralysis and become a paraplegic." Id.

Richard J. Mandel, M.D. (EX-1)

Dr. Mandel is a board-certified orthopedist who maintains a surgical practice. EX-1(a). Dr. Mandel examined Claimant on September 30 2002, and documented his history, including his two at-work incidents in April, 2001 and September, 2002. EX-1 at 4-6. Dr. Mandel's examination revealed no muscle spasm or tightness, and no muscle atrophy or scapular winging. EX-1, 9-10. Straight leg raising was normal, as were muscle strength, reflexes and gait. Id. at 12. The doctor noted some decrease in the range of motion in the neck and mild limitation of motion of the upper extremities with rotator cuff weakness. Id. The doctor also found no evidence of cervical myelopathy, as Claimant had normal reflexes, no long track signs, no focal weakness and no Lhermitte's sign. He concluded that his examination found "no real objective abnormalities. The findings were strictly subjective in nature." EX-1 at 10.

Dr. Mandel also reviewed the objective medical reports and concluded that they revealed degenerative changes at multiple levels with some slight wedging of the T-12 vertebrae. An MRI of the thoracic spine dated March 15, 2001, disclosed a large central osteophyte at T6-T7. The cervical MRI of that date disclosed a left-sided disc herniation at C3-C4. Dr. Mandel attributed the findings to degenerative disease of the spine, mostly cervical and thoracic. He found no evidence of acute injury. EX-7 at 13-14.

Dr. Mandel found that Claimant's symptoms and the medical findings were most consistent with "long standing degenerative disease of the spine". The doctor found no evidence of an injury on September 11, 2002, and concluded that: "[t]he activity that he described at the

time that began, coupled with my review of the video of the yard and the pickup truck being driven around the yard, leads me to conclude that there was no, in fact, no injury occurred.” EX-7 at 15-16. Dr. Mandel stated that his opinion was based on the following factors:

the description of the timing of the onset of symptoms by the patient, the simultaneous appearance of symptoms of the neck, mid and lower back which speaks against a discrete injury having occurred, the various diagnostic studies that were performed and the results of those studies and also comparing them to prior imaging studies and prior medical records, and my examination of the patient. All of those facts combined with my experience in diagnosing patients with spinal injuries over the course of the past 25 years or so, all of those things leads me to my opinion.

EX-7 at 16-17.

Dr. Mandel addressed the findings of cervical myelopathy by other physicians, and noted that myelopathy is “rarely associated with trauma” and usually develops as the result of severe degenerative disease. EX-7 at 18. Dr. Mandel found that Claimant’s significant stenosis at C3-C4 resulted from a large osteophyte at that level, which was apparent on the MRI of Claimant’s cervical spine taken in March, 2001. Dr. Mandel observed that osteophytes tend to enlarge over time and their growth would further compromise the spinal cord in the area of their occurrence. Id.

Robert M. Cohen, M.D. (EX 2)

Dr. Cohen is a neurosurgeon, who was trained to treat individuals with nervous system conditions with surgery. EX 2(d). Dr. Cohen testified at deposition, and provided two written reports of his review of the evidence. EX 2(a). Dr. Cohen no longer has a clinical practice, but provides consultative examinations and medical records reviews. EX-2 at 9. He is not board certified in neurology. Id.

*Testimony*

Dr. Cohen examined Claimant and reviewed diagnostic studies and reports and concluded that Claimant was suffering from disc herniations at C3-4 and T6-7, with cord compression and generalized chronic spondylitic disease in all areas of the spine. NT 30-31. Dr. Cohen compared Claimant’s MRIs from March, 2001 and October, 2002, and found no changes in the findings between the studies with respect to both the cervical and thoracic spines. NT 24. Dr. Cohen concluded that Claimant’s problems with his thoracic spine could be traced back to August, 1993, (NT 29) and he placed his lower back problems in 1994 and neck complaints to 1995. NT 28. Dr. Cohen noted that Claimant’s treating doctor, Dr. Polan, had documented a “flare of neck problems in January 1999”. Id. The first documentation by Dr. Polan of lower back pain was in 1994. NT 29. The records noted “flares in 1996 and 1999”. Id.

Dr. Cohen concluded that Claimant’s working on September 11, 2002 “caused an aggravation of [his] ongoing clinical problems.” NT 65-69. However, Dr. Cohen believed that



given the condition of Claimant's spine, any activity could have cause his symptoms: "if his job was sitting and playing poker, he still would have gone on to develop all these diseases. The truck had nothing to do with the development of this disease and in fact, in this case it really had nothing to do with bringing on the symptoms from the diseases." NT 46-47. Dr. Cohen found that Claimant's genetics caused his degenerative spinal disease. NT 44-45. Dr. Cohen noted an increase in Claimant's symptoms, but in his opinion, "an exacerbation of an ongoing problem does not form a true causative relationship between that trauma and the problem in question". NT 69. He distinguished the legal and medical definitions of pre-existing condition. NT 68. The doctor believed that Claimant's condition had degenerated to the point where surgery was necessary, and he concluded that the danger of surgery was minimal compared to the danger of not having surgery. NT 33, 34. The doctor observed that the degeneration of Claimant's condition was reflected in the documentation of Babinski signs and hyperreflexia on October 28, 2002. NT 48. Dr. Cohen denied that driving a pickup truck had anything to do with the build up of pressure that his spinal cord had undergone over the years. Id.

As part of his review of Claimant's condition, Dr. Cohen inspected Claimant's job site, and drove around the terminal property in the pickup truck that Claimant used. EX-2 at 34-42. Dr. Cohen testified that on June 25, 2003, he drove Mr. Coley's vehicle in the area where Claimant was when he experienced his symptoms on September 11, 2002. Id. The doctor did not observe any conditions that he believed would cause Claimant's symptoms. In Dr. Cohen's opinion, driving around the streets outside of the terminal were worse than driving around the terminal. Id. Dr. Cohen did admit that the truck "rumbled a little bit". EX-2 at 38.

### *Reports*

#### December 6, 2002

Dr. Cohen authored a report following his examination of the Claimant on November 27, 2002. The doctor documented Claimant's reported history of experiencing pain in his lower thoracic spine that radiated to his chest and up the neck in 1988. He was diagnosed with a "pinched nerve" and after rest and physical therapy, the pain resolved. Claimant reported experiencing this pain on occasion thereafter, experiencing a severe flare in February, 2001. The doctor noted: "[h]e and his wife, who was present throughout the entire session, agree this is simply another one of the flares which have been going on since 1988".

Dr. Cohen noted Claimant's reported pain in his posterolateral neck radiating down into the left interscapular area and across the dorsal left shoulder, as well as pain in his low back with stiffness. He was noted to have full motor strength in all extremities except for a small degree of weakness in the plantar flexion of the left foot. The doctor noted that his gait was unusual, and spasm was detected in the paraspinal musculature. The doctor's review of a March 15, 2001 MRI of the cervical spine showed dessication at all levels, and a herniated disc at C3-4 projecting significantly into the canal and cord. Bulges were observed at other levels. The MRI of the thoracic spine of that date showed a lordotic curve and significant herniated discs. Dr. Cohen reviewed the MRI's performed on October 20, 2002 and found no difference between them and the earlier tests. The doctor then summarized Claimant's treatment by Dr. Freedman, his records from Methodist hospital from September 11 to 13, 2002, and his subsequent physical

therapy and treatment by Dr. Lefkoe. Claimant's examinations by consulting doctors were also summarized.

Dr. Cohen concluded that his review showed degenerative changes with bulges and herniations at many levels of Claimant's spine. He diagnosed generalized chronic spondylitic disease, and noted that the treatment records reflected that his condition was progressing. Dr. Cohen observed that there were no signs of cervical myelopathy in examinations by Dr. Lefkoe until October 28, 2002. Dr. Cohen found that Mr. Coley's condition had worsened between that exam and his a month later. He strongly recommended immediate surgery to address Claimant's cervical myelopathy.

#### February 25, 2003

Dr. Cohen summarized the results of his initial examination and evaluation, and noted that Claimant had consulted with neurosurgeon Giancarlo Barolat, M.D. on January 17, 2003. In addition to summarizing Dr. Barolat's findings, Dr. Cohen summarized his review of the records of Harold A. Polan, D.O., Claimant's treating physician, as well as other doctors. Dr. Cohen noted that the records reflected that on November 29, 2001, Claimant's diagnosis was of "resolving thoracic radiculopathy". In addition, it was noted that Claimant continued to report neck and thoracic spine pain to Dr. Freedman through October 4, 2001. Dr. Cohen explained his opinion that an aggravation of an ongoing pre-existing condition does not reflect a causal relationship between the event and the problem. Furthermore, Dr. Cohen concluded that a condition could not be aggravated unless an individual is asymptomatic for at least one year before the aggravating injury or event. See, NT EX-2 at 68-69.

#### June 20, 2003

Dr. Cohen again summarized Claimant's treatment and addressed the office notes of the Claimant's family physician, Dr. Harold Polan. Dr. Cohen noted Dr. Polan's references to Mr. Coley's complaints of back pain before September, 2002, and again concluded that the Claimant's symptoms were solely due to the progression of his degenerative disc disease, and were unrelated to a trauma experienced on September 11, 2002. See, NT 46, 85.

#### Giancarlo Barolat, M.D. (EX 5)

Dr. Barolat is a board certified neurosurgeon who examined Claimant on January 17, 2003. In his report of that date, Dr. Barolat noted that the recent MRI of Claimant's cervical spine showed diffuse degenerative disc disease at multiple levels and a large osteophytic disc herniation at C3-C4 which effaces the anterior subarachnoid space. The doctor also saw a grade I retrolisthesis at that level, and a herniation at C4-C5. The doctor's examination found Claimant to have normal strength and sensation in the upper and lower extremities and neck pain in the lower aspect of the cervical region. Although the doctor did not provide a definitive cause for Claimant's pain, he concluded that he had compression of the spinal cord by the osteophyte at C3-C4 and signs of myelopathy. The doctor recommended surgery to treat the myelopathy, but differentiated that condition from the source of Claimant's pain.

Todd Albert, M.D. (EX 6)

Dr. Albert is an orthopedic surgeon who examined Claimant on November 18, 2002 upon referral by Dr. Lefkoe. Some reduced motor strength was noted in the left deltoid and biceps, and his gait was slightly unsteady. Subjective tingling was noted. Dr. Albert concluded that Claimant suffered from a herniated disc at C3-4, with C-4 cervical radiculopathy and some cervical angina. Dr. Albert referred to Claimant's cervical MRI of October 20, 2002, which he concluded demonstrated a large spur at C3-4.

Zach Broyer, M.D. (EX 6)

Dr. Broyer (credentials unknown) examined the Claimant on December 3, 2002 upon Dr. Albert's referral. Dr. Broyer noted that reflexes were 2+, and Babinskis' were both downgoing. The doctor recommended a nerve block at C-4 and found that Claimant would be a surgical candidate if that treatment did not relieve his symptoms.

Matthew De Caro, M.D. (EX 8)

Dr. De Caro's report of April 18, 2001 notes that he first saw Claimant in 1988 after he experienced chest pain. In a letter of May 7, 2001, Dr. De Caro advised Claimant's treating physician that a cardiac catheterization showed essentially normal coronary arteries, and that his anginal chest pain was not cardiac related, but appeared to be disc disease causing chest wall pain or gastric pain.

Methodist Hospital Record (EX 7)

The record documents Claimant's treatment at the emergency room on September 11, 2002 and his admission indicating left sided chest pain. Naprosyn and Zocor were medications documented. The record reflects that Claimant also complained of back pain radiating to left chest wall. Objective tests did not produce a definitive diagnosis.

**Other Evidence**

Videotape and Photographs of Road Conditions (EX 4; EX 2 (b-c); EX 3 (a-d))

Claimant has submitted photographs of the roads at the terminal that he traversed during the course of his employment. Employer Greenwich submitted photographs depicting the roadways at the terminal, as well as a videotape of a pickup truck driving at a slow rate of speed along the roadways of the terminal. Photographs taken by Dr. Cohen were also admitted.

Incident Report of Robert H. Kermon, Jr. (EX 9)

Report dated September 11, 2002 and prepared by Mr. Kermon indicates that his inspection found the seat of Claimant's truck to be in good condition, and the suspension looked good.

Records of Evidence before ALJ Romano (PEX 1-23)

Employer Holt introduced the entire record of the evidence before ALJ Romano in the adjudication of Claimant's earlier injury. Those records include:

Treatment records of Dr. Freedman and his testimony.

Records of Claimant's admission to Methodist Hospital dated March 29, 2001, documenting chest pains that started an hour after a meal.

Consultation and examination by Dr. Gad Guttman

Mr. Coley's testimony.

Judge Romano's Decision and Order of April 25, 2002, wherein he accepted the uncontradicted testimony and opinions of the doctors that Claimant's work had aggravated his pre-existing cervical and thoracic conditions.

b. Discussion

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902 (10). Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). Generally, a claimant has the burden of proving the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 B.R.B.S. 56, 60 (1980).

**Section 20(a) Presumption**

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the conditions. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). A claimant need not affirmatively establish a connection between work and the harm, but has the burden of establishing only that (1) he sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed that could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). An injury includes the aggravation of a pre-existing non-work related condition or the combination of work and non-work related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). If an employment related injury contributes to, combines with, or aggravates a pre-existing or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish a prima facie case and

invoke the section 20(a) presumption. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

It is undisputed that Claimant has disease of the cervical, thoracic and lumbar spine, and received compensation under the Act for an injury sustained in 2001. Although Claimant's underlying spinal disorder was not healed through treatment, his symptoms following his 2001 injury had resolved to the point where he had been able to work for some 10 months without debilitating pain. The evidence establishes that while at work on September 11, 2002, he experienced an onset of pain severe enough to require a two day hospitalization to investigate its cause. The record reflects that although Claimant had occasional pain, the pain he felt on that day was a significant departure from his usual experience. However, Claimant had experienced similar symptoms, including on the day that gave rise to his prior claim.

The medical evidence consistently shows that Claimant has degenerative disc disease and that any activity by the Claimant could trigger an increase in his symptoms. It is clear from the record that, although not totally asymptomatic, he experienced an increase in his level of pain while at work on September 11, 2002. Although the videotape depicted a fairly smooth road, photographs of the terminal area depict uneven road surface and potholes. Dr. Mandel's testimony regarding photographs depicting road conditions corroborated Claimant's testimony. In addition, the photographs show a roadway in disrepair, unlike the roadways shown in the videotape. EX-1 at 21-22. I find that the evidence establishes overall that the roadways in the terminal are not completely smooth.

I find that the evidence establishes that Claimant experienced an exacerbation of his previous compensable spinal disorder, which constitutes a presumably compensable injury under section 20(a) of the Act.

### **Rebutting the Presumption**

Once the presumption is invoked, the burden shifts to the employer to rebut it with substantial countervailing evidence that establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). Substantial evidence means that which reasonable minds might accept as sufficient to support a conclusion. *E & L Transport Co. v. NLRB*, 85 F3d 1258 (7<sup>th</sup> Cir. 1996). The presumption must be rebutted with specific and comprehension medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). Reliance on speculation or hypothetical probabilities is not sufficient to rebut the presumption. *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

To rebut the presumption, Employer Greenwich offered the deposition testimony of Drs. Mandel and Cohen. After examining the Claimant and reviewing the objective medical evidence, Dr. Mandel found no evidence of acute injury. EX-1 at 13-14. He found no objective abnormalities upon his physical examination of the Claimant, but concluded that the objective evidence revealed that Claimant has degenerative disease of the spine. *Id.* The doctor specifically denied that Claimant suffered an injury related to work duties on September 11,

2002. He based his conclusions upon his examination, diagnostic study results, the Claimant's description of the onset of his symptoms and his experience treating patients with spinal injuries. EX-1 at 16-17. Dr. Mandel attributed Claimant's symptoms to his significant spinal stenosis at C-4 and the osteophyte formation present at that disc. Id. At 18. Dr. Mandel denied that Claimant's activities on September 11, 2002 led to his development of cervical myelopathy. In Dr. Mandel's opinion, Claimant's cervical myelopathy was caused by his spinal stenosis. Id. at 18, 19.

Dr. Cohen concluded that Claimant's work caused an aggravation of his spinal disorder, but denied that the exacerbation of his condition was caused by trauma. EX-2. Dr. Cohen concluded that any activity could have caused Claimant's symptoms. Id. at 46, 50-53. The doctor believed that Claimant's spinal disease was significant enough that "if he was simply sitting at a table playing poker, his [C-4 lesion] would have caught up with his spinal cord anyway." Id. In Dr. Cohen's opinion, driving a pickup truck had nothing to do with the cause of Claimant's symptoms on September 11, 2002. Id. at 46-47. Dr. Cohen further concluded that a condition could not be aggravated unless an individual is asymptomatic for at least one year before the aggravating injury. EX 2(a). The doctor noted that Claimant had symptoms of back pain before September 11, 2002, and found that his symptoms were related solely to the progression of his degenerative disc disease. EX 2 at 47-48. The doctor observed that Claimant and his wife told him that Mr. Coley experienced "flare-ups" of pain going back to his initial diagnosis of a spinal disorder in 1988, and that the pain he felt on September 11, 2002 was another flare up. EX 2 at 18-19. Dr. Cohen found further evidence of the deterioration in Claimant's spine by the first appearance of hyperreflexia and Babinski signs on October 28, 2004. Id. at 49. Dr. Cohen again rejected Claimant's truck driving as an aggravating factor in his condition, and observed that these signs of abnormality did not appear during examinations that were performed closer in time to when Claimant was driving a truck. EX 2 at 85-86.

Employer Greenwich also offered into evidence the testimony and incident report of that Employer's Director of Safety and Loss Control, Robert H. Kermon, Jr. Mr. Kermon investigated the road conditions and observed some "deflections" in the roadway, but denied the existence of potholes or other hazardous conditions. EX 10. Mr. Kermon found the suspension and seat of Claimant's truck to be in good condition. EX 9, 10.

A videotape of the terminal purporting to depict the area traveled by Claimant on September 11, 2002 revealed a roadway that was free of significant indentations, rises, potholes or other obvious hazards.

Dr. Mandel's unequivocal testimony that Claimant's spinal stenosis was accountable for his symptoms is supported by Dr. Cohen's opinion that Claimant's condition was inevitable, and that his work did not cause his decline. Moreover, the evidence regarding the road conditions, when considered with Claimant's description of the onset of his symptoms, substantially establishes that the employment conditions on September 11, 2002 were no different from any other day, and by themselves, do not establish a condition that caused Claimant's pain. I find that substantial evidence has been presented to affirmatively sever the causal connection between Claimant's harm and the conditions of his employment.

## **Weighing the evidence**

Once the presumption of causation has been successfully rebutted, the presumption no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Devine v. Atlantic Container Lines, GIE*, 25 BRBS 16, 20-21 (1990). Claimant must show by a preponderance of the evidence that his employment caused, contributed to, or aggravated his condition. In circumstances such as the instant case, where Claimant alleges a second work related injury, that injury need not be the determinative factor for compensation purposes. If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). If an injury is the natural and unavoidable consequence of a previous injury, or there is a natural progression of the condition, then it is also compensable.

Claimant has argued in the alternative that the onset of symptoms that he experienced on September 11, 2002 was an aggravation of his 2001 compensable injury, or the natural progression thereof. The determination of this issue shall also determine the Responsible Employer, each of which has made arguments in support of its position. However, I must address the issue of causation before reaching that issue.

Section 2(2) of the Act defines “injury” in pertinent part as an “accidental injury or death arising out of and in the course of employment.” 33 U.S.C. section 902(s). Whether an injury arises out of one’s employment depends upon the cause or the source of the injury. To establish a new compensable injury, a claimant must show that work conditions aggravated the original injury. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 518 (4<sup>th</sup> Cir. 2000); (affirming ALJ and Board finding of no new injury where claimant was not exposed to “second trauma” but rather suffered from “an onset of complications from the first trauma”).

In the instant case, the record reflects that Claimant was injured in 2001 while working for Employer Holt. See, PEX 1-23. After conservative treatment, Claimant returned to his usual work duties and worked for months without significant pain in his back, neck or arm, although he was restricted from working overtime and continued to experience intermittent pain.

Claimant’s credible testimony regarding his work activities on September 11, 2002 described a day like any other, and he cited no unusual incident that precipitated his symptoms. He described his work conditions as requiring him to traverse railroad tracks in a pickup truck and he said the roads had potholes. Photographs of record support Claimant’s assertions. Claimant stated that he experienced his chest pain after crossing over railroad tracks. He had crossed over the tracks earlier in the morning, but his symptoms occurred sometime after his lunch break. Claimant testified that he observed speed limits and crossed railroad tracks with caution. Mr. Kermon inspected the area on September 11, 2002 and testified that he saw no significant irregularities in the road. Dr. Cohen also inspected and drove in the area, and disputed that the road had significant irregularities. Also, a videotape of a pickup truck driving down a terminal road revealed a relatively smooth road surface. I accord limited weight to Dr. Cohen’s testimony, and to the videotape, as it has been undisputed that the roads are repaired from time and time, and I am therefore unable to conclude that the road conditions on the dates

of the videotaping and Dr. Cohen's photography are reasonably similar to the conditions that existed on September 11, 2002.

Mr. Kermon conceded that on the date in question, some declinations in the road were obvious. Nevertheless, even accepting that the roads were pitted with potholes, and that the railroad tracks left deep impressions in the road's surface, Claimant did not assert that their condition on September 11, 2002 was any worse than on any other day that he had traveled them without experiencing the pain he felt on that day. Nor did he describe the condition of the railroad tracks to be different from any other day on the job. He drove several hours that day and traversed the tracks several times before experiencing an onset of pain. In addition to driving around the terminal during the months after his return to work, Claimant was able to drive his personal vehicle every weekend from his home to the New Jersey shore without incident, a distance of which I take official notice to be at least 60 miles each way. What is similar between other incidents where Claimant experienced severe chest pain is that the pain occurred within one hour of eating. See, EX 8; PEX 8; TR 65-66.

Dr. Lefkoe first saw Claimant for treatment on September 19, 2002. The doctor's notes documenting Claimant's reported history are inconsistent with Claimant's testimony, in that Claimant testified that he continued to feel intermittent pain after his return to work following his 2001 injury, while Dr. Lefkoe notes that Claimant was working without pain. Although Dr. Lefkoe diagnosed Claimant with a cervical, thoracic and lumbar sprain and strain that aggravated his pre-existing disc disease, he based that diagnosis upon Claimant's report of an incident at work on September 11, 2002 that caused the pain and later produced a cervical myelopathy. The work incident was not clearly defined in Dr. Lefkoe's notes or in his testimony, although the doctor noted that Mr. Coley had reported driving a pickup truck with no springs and a hard seat. He agreed that Claimant did not report a fall, was not engaged in heavy lifting, and was not involved in an automobile accident. Dr. Lefkoe agreed that prior to September 11, 2002, Claimant had severe disease of his spine that could have a genetic component. The doctor admitted that "[a]ssuming that there was no incident at work...it is possible that I would have to look for some other cause for a worsening of his condition". CX 1 at 45.

The doctor conceded that all of Claimant's disc herniations had occurred before September 11, 2002, and that his cervical myelopathy and abnormal Babinski tests were not evident until October, 2002. Dr. Lefkoe admitted that he did not make a comparison between Claimant's MRIs from March 2001 and October 2002, and further admitted that he could have experienced an accident at home after September 11, 2002 that would have been responsible for the October, 2002 findings. Id at 49-51. Dr. Lefkoe agreed that Claimant's condition in September 2002 could have been the result of the progression of his pre-existing condition, but said that he based his opinion upon the history Claimant related. Id. at 54-55. Dr. Lefkoe testified that if that history was inaccurate, then "anything else is possible" as the cause of his condition, and that any routine activity could have precipitated the pain, without any trauma. Id. Dr. Lefkoe agreed that a sudden onset of pain would be related to the underlying pathology in his spine.

I find that Dr. Lefkoe's opinion that a work related injury aggravated Claimant's condition by "strain and sprain" is not consistent with the objective findings, and is too



speculative to warrant substantial weight. I find that the doctor based his opinion upon an incomplete and possibly inaccurate history. He did not review all of Claimant's treatment records. He was unaware that Claimant experienced a very similar incident in the past that was not attributed to trauma. I note that Dr. Lefkoe placed great weight on Claimant's reported history of trauma, which was the foundation for the doctor's opinion regarding causation. In conflict with Dr. Lefkoe's understanding, the record is clear that Claimant's truck had been equipped with a new seat and had good suspension. The only unusual incident reported by Claimant on September 11, 2002 was the sudden onset of pain he experienced after crossing railroad tracks, which he had done several times that day, and apparently every other preceding work day. Claimant did not describe any other significant event that triggered his pain. Indeed, Claimant admitted experiencing similar incidents of pain unrelated to his work, incidents that he did not share with Dr. Lefkoe. He also admitted that he felt sore on that day before the chest pain began, and has experienced intermittent back and neck pain for years. I do not find substantial evidence of record that a traumatic incident occurred on September 11, 2002. Claimant's symptoms mirror those he experienced in March, 2001, at his home, shortly after eating a meal. I also find that Claimant's testimony is inconsistent in some respects, particularly his report of the condition of his truck to his doctor, and his testimony that on September 11, 2002, he took only over the counter pain medication. Records from Dr. Lefkoe and Methodist Hospital reflect that in September, 2002, Claimant reported that he still took the prescription medication Naprosyn, an anti-inflammatory. Accordingly, I discredit Dr. Lefkoe's conclusions that Claimant experienced an injury at work on September 11, 2002 that aggravated his condition through "sprain and strain".

However, Dr. Lefkoe specifically stated that in the absence of a specific trauma, he would look for another cause for the pain, and stated that any activity by Claimant would be sufficient to trigger onset of pain due to the condition of his spine. In the absence of trauma, Dr. Lefkoe testified consistently with the objective medical record, particularly evidence of deterioration demonstrated by tests results from October, 2002, that were not present at tests performed in September, 2002. I find this opinion by the doctor to be well-reasoned and well supported. It is within the administrative law judge's authority to evaluate and draw inferences from the medical evidence of record. I place more weight on Dr. Lefkoe's conclusions that a sudden onset of pain would be consistent with Claimant's underlying spinal disease. In addition, I credit Dr. Lefkoe's well supported opinion with additional weight because of his status as treating physician and his expertise as a certified orthopedic surgeon.

The other medical opinions of record support finding that Claimant's current spinal condition is the result of the natural progression of his degenerative spinal disease. Dr. Mandel's examination of the Claimant on September 30, 2002 revealed no objective abnormalities, and he characterized the findings of decrease in range of motion and rotator cuff weakness as subjective. EX 1 at 10. The doctor did find evidence of long standing degenerative disease of the spine, but found no evidence of injury or trauma. Although the doctor's examination occurred before the Claimant exhibited abnormal Babinski signs and hyperreflexia, he noted that the development of myelopathy is the result of severe degenerative disease. EX-1 at 18. The doctor observed that a large osteophyte was evident at Claimant's T6-T7 on an MRI taken on March 15, 2001. EX 1 at 13-14. The doctor stated that osteophytes grew over time and their growth would compromise the spinal cord. The doctor also noted that osteophyte formation at the C3-C4 level was evident

on the MRI that Claimant underwent in March, 2001. EX 1 at 18. Dr. Mandel found that Mr. Coley had recovered from his September, 1, 2002 symptoms, and concluded that the findings and Claimant's complaints were consistent with "long standing degenerative disease of the spine", and he said that "the simultaneous appearance of symptoms of the neck, mid and lower back...speaks against a discrete injury having occurred". EX 1 at 15-17; 43. I credit Dr. Mandel's opinion that Claimant's condition is due to his degenerative disease of the spine as well-reasoned and well-documented. I note that the doctor is a board-certified orthopedist who treats patients in a surgical practice. His opinion is accorded great weight.

Dr. Cohen found that Claimant's lumbar and cervical problems dated back to 1988. EX 2 at 64. The doctor discounted trauma as a cause of Claimant's symptoms, and concluded from his observations of Claimant's workplace that the work conditions would not have caused his symptoms. Id. at 65, 66. Dr. Cohen asserted that by working, Claimant aggravated his clinical problems. However, the doctor concluded that virtually any activity by the Claimant would increase his symptoms. The doctor explained that his review of Claimant's treatment records documented that he had experienced similar pains on several occasions since 1988. Dr. Cohen concluded that Claimant's condition is due to genetics and not work-related in any way. Id. at 86. Dr. Cohen stated that he did not have enough information regarding the cause of Claimant's onset of symptoms in 2001, but was familiar with Claimant's gradual return to work in August, 2001, until his return to full time status in October, 2001. Id. at 88-90. I do not find the doctor's opinion compromised by his unfamiliarity with the evidence presented in Claimant's adjudication of his 2001 compensable injury. The doctor reviewed, as best he could, Claimant's entire treatment record. The doctor concluded that Claimant experienced no trauma on September 11, 2002 that would have worsened his spine, but rather found that Claimant's condition was deteriorating regardless of his activity. Id. at 49. In support for his contention, he relied in part upon the appearance of objective findings in October, 2002, that were not evident in several examinations in September, 2002. Id. at 48.

I have given no credence to Dr. Cohen's interpretation of the legal meaning of the terms "aggravation" and "pre-existing". However, I find that the doctor's well-reasoned conclusions - regarding the cause of Claimant's pain do not rest upon his notion of what constitutes aggravation of a pre-existing injury, or how long an individual must be asymptomatic before a condition may be deemed to have been aggravated. Accordingly, I find that any legal misconceptions of the doctor with respect to these concepts do not significantly compromise his medical opinion that Claimant experienced no trauma that caused his symptoms on September 11, 2002, and his opinion that work conditions were not responsible for Claimant's symptoms. I find that the doctor's opinions with respect to whether Claimant suffered a work related injury are supported by the objective record, and I find them entitled to weight so far as they are consistent with the objective record. Although Dr. Cohen does not treat patients clinically, I note that he is trained as a neurosurgeon, and accordingly, his well-reasoned opinions are entitled to additional weight.

I find that the record is devoid of evidence sufficient to conclude that a specific incident or accident occurred on September 11, 2002 that caused Claimant's condition or aggravated an earlier injury. I find no evidence to relate the deterioration of Claimant's spine to his work conditions. I find that the evidence supports a finding that the Claimant's condition is the result

of the natural progression of the deterioration of his spine. Moreover, I find that on September 11, 2002, Claimant experienced a recurrent episode of chest wall and back and neck pain that was related to a spinal condition that predated his compensable injury in his 2001 claim and is unrelated thereto. His onset of pain on September 11, 2002 was similar to other similar incidents that he has experienced since 1988, without any relation to his prior compensable injury. See, EX 8.

I further find that the cervical myelopathy found present in October, 2002 is the natural progression of the underlying disc disease of the cervical spine and not related to any condition of employment, or specific traumatic event experienced in either 2001 or 2002. The record reflects that Claimant's previous compensable injury resolved and he returned to work. I find that the record shows that Claimant's current condition continues to progress without regard to his work activity, as evidenced by the presentation of Babinski signs and hyperreflexia a full month after he left work in September, 2002. Every physician of record has urged Claimant to undergo surgery to avoid further compression on his cervical spine, to which the well-reasoned medical opinions attribute his current condition. The evidence does not demonstrate that Claimant's current condition is related to an injury he sustained, or the conditions of his employment, on September 11, 2002.

#### V. CONCLUSION

Based upon the foregoing, Claimant is not entitled to compensation under the Act. I find that the evidence establishes that the progressive deterioration of Mr. Coley's spine is solely due to his degenerative disc disease, and not the result of an injury or work conditions. Furthermore, Claimant's current condition is not related in any way to an aggravation of a prior compensable injury, nor the natural progression of the prior compensable injury. Accordingly, Claimant has failed to meet his burden of proving causation.

Because I have found that Claimant has not established causation, I need not determine the issues of whether he complied with medical treatment, which employer is responsible, or whether 8(f) relief is appropriate.

#### ATTORNEY'S FEE

As there has not been a successful prosecution of the claim, Claimant's attorney is not entitled to a fee pursuant to § 28 of the Act.

#### ORDER

It is ORDERED that the claim of JOHN COLEY for benefits under the Act be DENIED.

**A**

Janice K. Bullard  
Administrative Law Judge